83-1141

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 83-

In The
Supreme Court of the United States
October Term, 1983

MULTIFLEX, INC.,

Cross-Petitioner,

vs.

SAMUEL MOORE AND COMPANY and EATON CORPORATION,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Is "fact of damage" under Section 1 of the Sherman Act satisfied by undisputed evidence of virtually complete exclusion of a new entrant (Cross-Petitioner) from all sales over more than a two year period to all middlemen (OEMs) in the relevant market, where such exclusion results from a conspiracy between those middlemen and the dominant manufacturer?

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Cross-Petitioner, Multiflex, Inc., prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 22, 1983, with respect to the portion of that Opinion and Judgment dealing with the "fact of damage" under Section 1 of the Sherman Act.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 709 F.2d 980. It is reproduced in Appendix A of the Petition for Writ of Certiorari filed by Petitioners Samual Moore and Company and Eaton Corporation. Also, the petition for rehearing dated September 14, 1983 is reproduced in Appendix B to the Petition for Writ of Certiorari. The district court's judgment, dated September 4, 1981, which includes the jury interrogatories, is reproduced in Appendix C of that Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). This Cross-Petition for Writ of Certiorari is filed under U.S. Supreme Court Rule 19.5. The Petition for Certiorari in connection with which this Cross-Petition is filed was received on December 15, 1983.

STATUTORY PROVISIONS

The statutory provisions involved in this Petition are Section 1 of the Sherman Act, 15 U.S.C. §1, which provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or com-

merce among the several states, or with foreign nations, is declared to be illegal: . . ."[1]

And Section 4 of the Clayton Act, 15 U.S.C. §15, which provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[2]

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STATEMENT OF THE CASE

Cross-Petitioner, Multiflex, Inc.[3] adopts and incorporates by reference the Counterstatement of the Case in Respondent's Opposition to the Petition for Writ of Certiorari. The following additional comments are specifically directed to this Cross-Petition.

The jury found that there was a conspiracy between Moore and the three middlemen (OEMs), App. C at p. 2c. The court below analyzed the evidence and agreed that

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[1] The remainder of that statute is not pertinent to this Cross-Petition.

[2] The remainder of that statute is not pertinent to this Cross-Petition.

[3] Under Rule 28.1, Multiflex U.K., Inc. and Multiflex Offshore Services, Ltd., are subsidiaries, and M.F.X. do Brazil Ltda. is an affiliate.

there was "ample evidence of a conspiracy to restrain trade". 709 F.2d at 988; App. A at p. 10a.

The court below found that the evidence Multiflex presented showed the existence of the conspiracy beginning with the January, 1978 meeting between Moore and each of the OEMs, 709 F.2d at 988, App. A at p. 12a. There was evidence of a specific job which was lost by Multiflex in October, 1977, identified as the "SEDCO bid" (709 F.2d 988; App. A at p. 12a) which the court below found was adequate for the fact of damage proof under Section 2, but the court below concluded that Multiflex had not shown an adequate "fact of damage" related to the conspiracy claim and therefore could not recover treble damages under Section 4 of the Clayton Act based on its Section 1 conspiracy claim. 709 F.2d 989, 990; App. A at p. 13a. *On that basis alone*, the court below reversed the district court's award of damages under the Section 1 theory.[4]

The court below, however, overlooked the undisputed evidence that *after* January 1978, the starting point of the conspiracy, Multiflex was excluded from all sales to the three OEMs, the co-conspirators with Moore, for the entire year of 1978. Further, Multiflex was excluded from all sales to the three OEMs in 1979, with the exception of several sales to one of the OEMs (Cameron). The un-

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[4] The Fifth Circuit made such determination even though Moore never argued that the jury verdict failed to support the "fact of damage" under Section 1.

disputed evidence further showed that those sales were forced on Cameron by Multiflex's customers in 1979.[5]

An additional "fact of damage" after the January 1978 conspiracy was the loss of a sale of a hose bundle to a customer identified as "ENIEPSA". That loss occurred in early 1979. One of the OEMs (NL Industries—formerly Stewart & Stevenson) was asked by the end user to include a Multiflex bundle in its quotation for the turnkey job from that OEM. Even though the pressure ratings of the hose bundle were overstated by Moore and were below the industry standard, and even though Multiflex had a hose bundle which met the industry standard pressure ratings, NL Industries refused to quote the Multiflex bundle to the customer and instead quoted only the Moore bundle with the result that Moore, and not Multiflex, got the order.[6] Either of these two facts of damage was sufficient evidence to support the jury verdict of injury (Jury Interrogatory No. 6; App. C at p. 3c); the court below ignored such evidence even after it was emphasized in Multiflex's Petition for Rehearing.

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[5] For the purposes of this Cross-Petition, the evidence with respect to the forced sales to Cameron need not be considered since the sales are de minimis compared to the other sales to the three OEMs from which Multiflex was completely excluded in the years 1977, 1978 and 1979 (PX-190).

[6] The Fifth Circuit found that this incident of damage was a result of the "anticompetitive practices" of Moore. 709 F.2d at 994; App. A at p. 22a, fn 14. The court below further found that: "While the conspiracy was in force, customers were discouraged from buying from anyone other than Moore. This evidence forms a proper basis for a jury to find an unreasonably dangerous effect on competition." 709 F.2d at 988; App. 1 at p. 11a. Thus, there is an effect on competition from the anticompetitive practice and the fact that Multiflex did not get the order as a result conclusively demonstrates a fact of damage.

REASONS FOR GRANTING THE WRIT

I. The Court Below Decided An Important Federal Question, Namely, The Requirement For Proof Of "Fact Of Damage" In A Section 1 Sherman Act Conspiracy, In A Way In Conflict With The Applicable Decisions Of This Court.

The court below found ample evidence of a conspiracy under Section 1 by Moore, including Moore's own "smoking guns" evidence in the form of internal memos and letters. 709 F.2d at 988; App. A at p. 10a. Even though the jury (and the judgment of the district court), found that Multiflex suffered "injury" to its business or property by reason of the conspiracy (Special Interrogatory No. 6; App. C at p. 3c) and further that the conspiracy was the direct and proximate cause of the injury to Multiflex (Special Interrogatory No. 7; App. C at p. 4c), the *only* basis for the Fifth Circuit reversing the Sherman 1 cause of action was that Multiflex had not shown any "fact of damage" related to the conspiracy claim. 709 F.2d at 989; App. 1 at p. 13a.

In so holding, the court below ignored the undisputed evidence that Multiflex had been excluded from all of the business with the three OEMs during 1978 and from all of the business in 1979 except for several forced sales, as pointed out above in the Statement of The Case. The court below focused only on a specific job identified as the "SEDCO bid" in October, 1977 and concluded that because it was prior to the beginning of the conspiracy in January 1978, there was no proof of "fact of damage". However, Multiflex specifically pointed out in a Petition for Rehearing that it in no sense limited its "fact of

damage" proof to the SEDCO job. Multiflex pointed out to the court below the complete exclusion of Multiflex from virtually all of the OEM business during the 1978-79 period and also pointed to two other jobs, one of which was identified as the "ENIEPSA" job which was lost by Multiflex in the early part of 1979 as a direct result of the conspiracy.[7]

This Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) dealt with a similar contention that the petitioners' evidence did not establish the "fact of damage". This Court, after referring to two prior decisions in which it had addressed precisely the same arguments,[8] stated in response to such contention, as follows:

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, *the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business*, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that *defendants' wrongful acts had caused damage to the plaintiffs.* In this we but followed a well settled principle. *See Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 38,

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[7] One of the conspiring OEMs refused to quote the end user a Multiflex bundle even though the end user specifically requested a quote for a Multiflex bundle.

[8] Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), and Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

> 39, 18 S.Ct. 255, 259, 260, 42 L.Ed. 648." [Emphasis added] 328 U.S. at 264.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, 89 S.Ct. 1562 (1969), this Court concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to "fact of damage", stating in Footnote 9:

> "Zenith's burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."

From the virtually complete exclusion of Multiflex from all sales to all of the OEMs in the relevant market, it cannot be logically disputed that there was proof of *some* damage from which the jury could have concluded as a matter of just and reasonable inference that Moore's wrongful acts had injured Multiflex's business. In failing to recognize such injury as "fact of damage", the court below reached a conclusion that could not have been reached if the court below had followed the above test from the *Bigelow* and *Zenith* cases and other decisions of this Court on this point. The decision below as it relates to the fact of damages is thus in conflict with this Court's decisions.

Since the "fact of damage" test is widely used by appellate courts as the threshold for recovery of damages under Section 4 of the Clayton Act,[9] it is important

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[9] See Von Kalinowski, *Antitrust Laws and Trade Regulations*, Vol. 10, §115.03(1) at p. 115-18 (1983), and appellate court cases cited in Footnote 2.

that a decision so clearly in conflict with this Court's decisions should not be permitted to stand without review by this Court.

II. Even If Proof Of A Specific Job Lost To Multiflex Is Required By This Court To Show "Fact Of Damage", There Is Undisputed Evidence That Such A Loss Occurred In Early 1979 After The Conspiracy Began In January 1978.

Although Multiflex contended below and still believes that the conspiracy between Moore and one of the OEMs (Stewart & Stevenson) began in October 1977, the court below concluded that the conspiracy began in January 1978. Accepting that date, and assuming that the "fact of damage" requires proof of loss of a specific job as a result of the conspiracy, the undisputed evidence is that on the job identified as the "ENIEPSA job", Moore obtained the sale and Multiflex lost it in circumstances which the jury could have concluded "as a matter of just and reasonable inference" was the result of the conspiracy.

In that "ENIEPSA job", the evidence established that the end user, ENIEPSA, had requested through its agent a quotation on the hose bundle, not only from Moore but also from Multiflex. Even though Moore was unable to supply the hose at the prevailing standard pressure rating, and even though the customer had requested the OEM to quote a Multiflex hose bundle, the Multiflex hose bundle was never quoted by the OEM to ENIEPSA. Multiflex had attempted to make a direct sale to ENIEPSA, through its U.S. agent, but the customer wanted the turnkey job which included the control equipment along with the hose bundle from the OEM. The conspiracy

thus precluded Multiflex from making any sale of its hose bundle to the customer ENIEPSA.

Cross-Petitioner Multiflex submits that this proof of a specific job loss is not required by this Court's applicable decisions on "fact of damage", but should Multiflex be in error in its understanding of this Court's prior decisions in *Bigelow* and the other cases prior thereto, the specific loss of the ENIEPSA job justifies a reversal of the court below on this point.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted with respect to Section 1 of the Sherman Act.

Respectfully submitted,

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January 12, 1984